Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1287

THE REPUBLIC OF CUBA, *et al.*,
Intervenor-Petitioners,
against
SAKS & COMPANY,
Defendant-Respondent.

THE REPUBLIC OF CUBA, *et al.*,
Intervenor-Petitioners,
against
FABER, COE & GREGG, INC.,
Defendant-Respondent.

THE REPUBLIC OF CUBA, *et al.*,
Intervenor-Petitioners,
against
ALFRED DUNHILL OF LONDON, INC.,
Defendant-Respondent.

BRIEF FOR RESPONDENTS SAKS & COMPANY AND FABER, COE & GREGG, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FILED BY THE REPUBLIC OF CUBA, *et al.*

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THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor of MENENDEZ, GARCIA Y COMPANIA, LIMITADA and MENENDEZ, GARCIA Y CIA, LTDA. and MENENDEZ Y GARCIA,

Interventor-Petitioners,

against

ALONSO MENENDEZ, JOSE M. GARCIA, BENJAMIN MENENDEZ, JOSE MENENDEZ and ADOLFO GARCIA, co-partners, doing business under the firm name and style of MENENDEZ, GARCIA Y COMPANIA, LIMITADA and MENENDEZ, GARCIA Y CIA, LTDA. and MENENDEZ Y GARCIA,

Owner-Respondents,

against

SAKS & COMPANY,

Defendant-Respondent.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; F. PALICIO Y COMPANIA, S.A.; CIFUENTES Y COMPANIA and POR LARRANAGA, FABRICA DE TABACOS, S.A.,

Interventor-Petitioners,

against

RAFAEL CIFUENTES, RAMON CIFUENTES and MANUEL CIFUENTES, co-partners, doing business under the firm name and style of CIFUENTES Y COMPANIA; ALONSO MENENDEZ, JOSE M. GARCIA, BENJAMIN MENENDEZ, JOSE MENENDEZ and ADOLFO GARCIA, co-partners, doing business under the firm name and style of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; POR LARRANAGA, FABRICA DE TABACOS, S.A.; and F. PALICIO Y COMPANIA, S.A.,

Owner-Respondents,

against

FABER, COE & GREGG, INC.,

Defendant-Respondent.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; F. PALICIO Y COMPANIA, S.A.; CIFUENTES Y COMPANIA and POR LARRANAGA, FABRICA DE TABACOS, S.A.,

Interventor-Petitioners,

against

RAFAEL CIFUENTES, RAMON CIFUENTES and MANUEL CIFUENTES, co-partners, doing business under the firm name and style of CIFUENTES Y COMPANIA; ALONSO MENENDEZ, JOSE M. GARCIA, BENJAMIN MENENDEZ, JOSE MENENDEZ and ADOLFO GARCIA, co-partners, doing business under the firm name and style of MENENDEZ, GARCIA Y COMPANIA, LIMITADA; POR LARRANAGA, FABRICA DE TABACOS, S.A.; and F. PALICIO Y COMPANIA, S.A.,

Owner-Respondents,

against

ALFRED DUNHILL OF LONDON, INC.,

Defendant-Respondent.

BRIEF FOR RESPONDENTS SAKS & COMPANY AND FABER, COE & GREGG, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FILED BY THE REPUBLIC OF CUBA, *et al.*

Respondents Saks & Company ("Saks") and Faber, Coe & Gregg, Inc. ("FC&G") submit this brief in opposition to the petition for a writ of certiorari filed by the Republic of Cuba, et al. ("Cuba") to review the judgment of the Court of Appeals for the Second Circuit entered in this action on September 24, 1973.

Questions Presented

Cuba poses five questions for consideration by this Court in the event its petition for a writ of certiorari is granted. Questions two through five, as set forth in the petition, raise issues relating to the respective rights of

the Cuban government and the former owners of certain cigar manufacturing companies which were intervened* by the Cuban government on September 15, 1960. Since Saks and FC&G will not be adversely affected, whatever the outcome with regard to these questions, our concern is limited to the following question:

1. Is the rule enunciated by this Court in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972), applicable to a situation in which (a) Cuba asserts claims against American importers of Cuban cigars; (b) the importers assert counterclaims smaller than the claims asserted by Cuba to be applied as setoffs against any judgment awarded to the Cuban government; (c) the Cuban government's claim and the importers' counterclaims relate to the same course of conduct and transactions; and (d) the case is clearly within the class of cases described in the letter submitted to this Court by the United States Department of State in the *City Bank* case, as to which the act of state doctrine need not be applied by the courts?

Statement of the Case

Respondents respectfully refer the Court to the statement of the case at pp. 3-8 of the cross-petition for a writ of certiorari in No. 73-1289.**

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* "Intervention" is a process, under Cuban law, by which Cuban officials seize control of privately owned properties and continue to operate them for the benefit of the Cuban government.

** The cross-petition seeks a writ of certiorari to review certain aspects of the judgment below, the writ to issue only if this Court grants the petition for a writ of certiorari filed on behalf of the Republic of Cuba in this case.

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Reasons for Denying the Writ

The Court below correctly applied this Court's decision in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972) to the facts of this case.

Less than two years ago, this Court, in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972) considered the applicability of the act of state doctrine, enunciated in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), to a situation in which a claim against a foreign state is asserted as a counterclaim in an action initially brought by that foreign state.

In the *City Bank* case, the bank had foreclosed on a secured loan made to Cuba after the Cuban government had seized all of its branches in that country. Cuba brought an action for the amount realized by the bank upon liquidation of the collateral, after application of the proceeds to repayment of principal and interest on the loan. The bank counterclaimed for the value of its seized assets.

Three Justices, in an opinion written by Mr. Justice Rehnquist, expressed the view that a counterclaim up to the amount of the claim asserted by the foreign state, would not be barred by the act of state doctrine. Mr. Justice Rehnquist relied upon a letter to this Court from the Legal Advisor of the Department of State expressing the Department's view that the

> "act of state doctrine should not bar consideration of a defensive counterclaim or offset limited to the amount of a claim for which a foreign government sued in a United States court arising out of a relation-

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> ship existing between the parties when the act of state occurred, at least where the foreign policy interests of the United States did not require application of the act of state doctrine." J. App. pp. 28a-29a.*

In a separate opinion Mr. Justice Powell concurred in the result, permitting the assertion of the counterclaim, but opted for a case-by-case approach in which the foreign policy interests for the United States would be only one of the factors considered.

Mr. Justice Douglas concurred in the Court's judgment on the authority of *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955), in which this Court held that the doctrine of sovereign immunity does not bar the assertion of a counterclaim against a foreign state when that state has invoked the jurisdiction of our courts. In his concurrence Mr. Justice Douglas wrote:

> "It would offend the sensibilities of nations if one country, not at war with us, had our courthouse door closed to it. It would also offend our sensibilities if Cuba could collect the amount owed on liquidation of the collateral for the loan and not be required to account for any setoff. To allow recovery without more would permit Cuba to have its cake and eat it too. Fair dealing requires allowance of the setoff to the amount of the claim on which this suit is brought." 406 U.S. at 772.

The considerations which led this Court to permit the counterclaim in the *City Bank* case, apply with even greater force in this case.

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* References to the "J. App." refer to the Joint Appendix filed by petitioners herein, petitioner in No. 73-1288, and cross-petitioners in No. 73-1289.

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A. This case falls within the *Bernstein* letter exception to the act of state doctrine.

Cuba has suggested that Mr. Justice Rehnquist's opinion in *City Bank* is of no aid to respondents because "there is no Bernstein letter" in this case (Pet. p. 6). It adds that "[t]he Stevenson letter in the *City Bank* case does not help the importers [because it was] specifically confined to the 'circumstances' of that case" (Pet. p. 7, n. 2).*

Cuba's position is contrary to the clear language and import of the Stevenson letter. As pointed out by this Court below (J. App. p. 29a) the letter concluded with the following paragraph:

> "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off *against the Government of Cuba in this or like cases.*" 10 International Legal Materials 89, 93 (1971). (Emphasis supplied).

The reasons for allowing the counterclaim, relied on in the Stevenson letter, were that the Cuban government's claim arose from a relationship between the parties which existed at the time of the act of state and that the counterclaim was limited by the amount of the Cuban government's claim. Both considerations are present here. The Cuban government's claim, for the value of post-intervention shipments of cigars made to the importers, arises from a relationship existing at the time of the alleged

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* The letter submitted by the Department of State in *City Bank* is called a *Bernstein* letter because it was patterned after a letter filed by the Department in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954).

"act of state,"* and the importers' counterclaim, for monies erroneously paid to the Republic of Cuba, is limited by the amount of Cuba's claim.

It should also be noted that the foreign state involved in the *City Bank* case was the Republic of Cuba, and that the State Department expressed the view that "the foreign policy interests of the United States do not require application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba" (10 International Legal Materials at 93). There has been no statement by the Department of State changing this view or a showing by Cuba of new circumstances applicable to relations between the United States and Cuba, sufficient to compel a change in result. Under these circumstances, this Court should conclude that the foreign policy considerations referred to in the Stevenson letter, and expressly made applicable to "this or like cases," remain in force at the present time and should be applied in this case.

B. Application of a case-by-case approach to the facts of this case leads to the result reached by the Court of Appeals.

In *City Bank*, Mr. Justice Powell's refusal to apply the act of state doctrine was based on his view that "[u]nless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation

* The alleged "act of state" in this case was the repudiation by counsel for the Republic of Cuba of its obligation to repay the importers. In its separate petition for a writ of certiorari in No. 73-1288, Alfred Dunhill of London, Inc. properly suggests that this repudiation by counsel does not constitute a valid act of state.

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to hear cases such as this." 406 U.S. at 775-76. The record is barren of any reference to such "delicate foreign relations," and the position adopted by Mr. Justice Powell in *City Bank* comports with the decision of the Courts below, to entertain the importers' counterclaims.

C. Application of the rule of *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955) to the facts of this case leads to the result reached by the Court of Appeals.

Cuba concedes that the opinion of Mr. Justice Douglas in *City Bank*, relying on *Republic of China*, supports the decision of the Court below that the act of state doctrine does not bar the importers' counterclaims in this case (Pet. p. 7).

As in *City Bank*, it would "offend our sensibilities" if Cuba could collect the amounts owed by the importers for the value of post-intervention shipments of cigars and not be required to account for any setoff. Fair dealing requires that Cuba not be permitted "to have its cake and eat it too," and that the importers' setoffs be allowed, up to the amount of Cuba's claim.

Once the protection afforded by the act of state doctrine is stripped away from the Cuban government—at least to the extent of the claims which it asserts against the importers—it stands before the Court as any other litigant. And under settled principles of the law of unjust enrichment, the Cuban government must return to the importers all amounts paid by mistake for pre-intervention shipments of cigars.

Conclusion

This case falls squarely within the holding of this Court's decision in the *City Bank* case and was correctly decided by the Court below. The petition for a writ of certiorari to review the judgment of the Second Circuit should be denied.

March 22, 1974

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